were accordingly *functus officio* as from that date and therefore no longer acting as receivers and managers on the date that they received the letter from the Customs stating the claim for unpaid sales tax.

Under the Companies Act, section 192 provides for the enforcement of duty of a receiver. Sub-section (1) provides that if a receiver or manager of a company makes any default in making or lodging any return account or other document or in giving any notice required by law and fails to make good the default within fourteen days after the service of a notice, the court may make an order directing him to make good the default. Section (2) provides that if it appears that any receiver or manager has misapplied or retained or become liable for any money or property of a company, the court may on the application of any creditor, compel him to repay or restore the property. It is clear to us that the appellants had neither made any default nor misapplied any property of the company to be liable under section 70 of the Sales Tax Act, 1972. They had complied with the requirement of giving due notice to the Director General of Customs. But unfortunately this notice was not responded to by the Customs until after four years later when the appellants had already ceased to act as receivers. A receiver would ordinarily be liable only if it be shown that he has not acted with perfect regularity or has not used a degree of prudence as would be expected from a private individual in relation to his own affairs. See also *Halsbury's* Third Ed. Vol. 32 para. 725.

Finally it would seem settled and accepted as such by Brett L.J. in *Roberts* v. *Death* that there is discretion of a court to make an order or not under Order 49 rule 6 as it is an exercise of an equitable power. In the circumstances of this case we do not think it was wrong for the learned Judicial Commissioner to have made the order as he did.

We will accordingly dismiss the appeal with costs. Deposit to respondent to account of taxed costs.

Appeal dismissed.

Solicitors: *Kanesalingam & Co.; H. H. Long & Co.; Shook Lin & Bok.*

PANG AH CHEE v. CHONG KWEE SANG

F.C. (Salleh Abas L.P., Wan Suleiman & Hashim Yeop A. Sani F.JJ.) September 4 & October 4, 1984]

[Johore Bahru – Federal Court Civil Appeal No. 326 of 1983]

Tort – Negligence – Fatal accident – Assessment of damages – Damages for loss of dependency – Number of years purchase – Prospect of marriage – Special damages – Proof of – Judicial notice – Evidence Act, 1950, ss. 56 & 57 – Civil Law Act 1956, ss. 7 & 8.

Damages – Fatal Accident – Assessment of quantum.

This was an appeal against the decision of Shankar J. reported at [1984] 1 M.L.J. 377. The deceased was killed when the motorcycle he was riding was knocked into by a motor car driven by the respondent. The mother of the deceased, the appellant, brought an action as administratrix of the deceased's estate and in her own capacity as dependant for damages under sections 7 and 8 of the Civil Law Act. In default of defence, an order was made precluding the defendant from defending the action. The learned President of the Sessions Court awarded $4,000/- for loss of life of which $2,000/- went to the deceased's father and the remainder merged with the appellant's dependency claim. The appellant was awarded $3,800/- for dependency claim and $7,920/- for future dependency, the learned President taking the dependency loss to be $100/- per month and the number of years purchase to be 17. The learned President also awarded $2,000/- for funeral expenses, $400/- for repairs to the motor cycle and $380/- for administrative and other expenses. On appeal the learned Judge reduced the dependency loss to $75/- per month and the number of years purchase to 7. The learned Judge disallowed the claim for special damages, for funeral expenses and repair to the motor-cycle as he held they were not proved. The appellant appealed.

Held: (1) the award of the learned President for the number of years purchase was far too excessive reflecting a wholly erroneous estimate. The prospect of marriage should have been considered and a smaller multiplier applied. The learned Judge was correct in reducing the number of years purchase to 7;

(2) the finding that a trial judge has erred in the direction of being too generous would not be itself constitute a matter to be appealed from and the appellate court is always slow to reverse the trial judge's decision on assessment of damages unless there are strong grounds for interference. The amount awarded by the learned Presisent for loss of dependency, that is $100/- per mensem, should be restored;

(3) there was sworn evidence in this case that the motor-cycle had been sent for repairs and certain payments had been made towards the repairs. These claims had been pleaded and particularised in the statement of claim and the learned appellate judge was therefore incorrect in disallowing the award of $400/- made by the learned President of the Sessions Court for this item;

(4) it was not wrong for the learned President of the Sessions Court in arriving at a reasonable and fair amount of compensation to be awarded to take judicial notice of Chinese funeral expenses and the fact that such expenses are normally incurred and only the amount would vary according to the status of the deceased or such other matters which may be considered by the Court. The award of the learned President of $2,000/- for funeral expenses should be restored.

Cases referred to:

(1) *Chong Khee Sang* v. *Pang Ah Chee* [1984] 1 M.L.J. 377.
(2) *Kandalla* v. *British Airways Board* [1980] 1 All E.R. 341.
(3) *Brennan* v. *Richard Johnson and Nephew Ltd.* C.A. 18 of 1952, see *Kemp & Kemp,* Quantum of Damages Vol. 1, 30-002.
(4) *Dolbey* v. *Goodwin* [1955] 1 W.L.R. 553.
(5) *Pahang Lin Siong Motor Co. Ltd & Anor.* v. *Cheong Swee Khai & Anor.* [1962] M.L.J. 29.
(6) *United Plywood & Sawmill Ltd..* v. *Lock Ngan Loi* [1970] 2 M.L.J. 237.
(7) *Kek Kee Leng* v. *Teresa Bong Nguk Chin & Anor.* [1978] 1 M.L.J. 61.
(8) *Davies* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601-617.
(9) *Bonham-Carter* v. *Hyde Park Hotel* (1948) 64 T.L.R. 177, 178.
(10) *Lee Sau Kong* v. *Leow Cheng Chiang* [1961] M.L.J. 17.
(11) *Rushton* v. *National Coal Board* [1953] 1 All E.R. 314.
(12) *Hart* v. *Griffith-Jones* [1948] 2 All E.R. 729.

FEDERAL COURT.

Tan Hock Kim for the appellant.
M. Varughese for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani F.J. (delivering the Judgement of the Court): We have disposed of this appeal but we feel that a short written judgment would be in order.

The appeal before the learned Judge was against the decision of the learned President of the Sessions Court, Johor Bahru in respect of the awards of general and special damages. Thus the appeal before the High Court and before us was an appeal against quantum only.

The action in the Sessions Court was commenced by the mother of the deceased who had died in a motor accident. In his written judgment(1) the learned Judge sitting in appellate jurisdiction had set out the background of this appeal chronologically and for convenience we will simply reproduce the excerpts from his judgment as follows:

"3. The Summons was served on 28th July 1979. The case was first mentioned on 16th August 1979. By the second mention date on 30th August 1979 no defence had been filed and an Order was made precluding the defendant from defending the action.

4. Thereafter the case was fixed for hearing to assess the damages to be paid.

5. However, the case was not proceeded with on 4th October 1979 because plaintiff had gone to Canada. It was adjourned to 7th February 1980. On that day Mr. Matthew Varughese appeared for the defendant.

6. The case was postponed to 28th February 1980 and thereafter there were 6 further postponements before the trial actually began on 6th November 1980, with Mr. Tan Hock Kim as plaintiff's counsel.

7. In the interim, on or about 11th March 1980, plaintiff's solicitors made their first amendment to the Statement of Claim. The funeral expenses were increased from $1,000/- to $2,545.25.

8. On 20th July 1980, a second amendment was made. This time the name of the deceased's father was struck out from the Statement of Claim as being one of the dependants for the purposes of the claim under Section 7 of the Civil Law Act 1956.

9. About this time it seems that solicitors representing the parties had some discussion about a proposed agreed bundle of documents which was to be used at the trial.

10. On 16th July 1980, plaintiff's solicitors Tan & Tan sent a letter to the defendant's solicitors Varughese & Co. A conversation was referred to on 15th July 1980 regarding an agreed bundle of documents handed to the defendant's solicitors on 26th June 1980 seeking the agreement of the defendant's solicitors for their inclusion in the agreed bundle. This letter was tendered in evidence in the Court below and marked Exhibit P9.

11. A reply was sent by the defendant's solicitors dated 23rd July 1980. The letter stated:

"We have no objection to the inclusion of the documents mentioned in paragraph 2 of your letter of the 16th instant."

But the letter also contained an offer to agree the funeral expenses at a sum stated. Most importantly the letter was marked "Without Prejudice".

12. The subsequent history of this matter quite clearly suggests that the parties did not put up an agreed bundle of documents nor was there any agreement as to the funeral expenses or for that matter any other damage, general or special, claimed by the plaintiff.

13. So when the trial began on 6th November 1980 the entire question of the damages to which the plaintiff was entitled was wide open."

It will be noticed from the history of the case that the case should really have been a simple and

straight-forward one. In our view the case became unnecessarily protracted largely because there was insufficient co-operation between the lawyers involved and subsequently insufficient restraint on the part of the learned Judge in the exercise of of appellate powers. Much scholarship had gone into the written judgment of the learned Judge and a very substantial part of the judgment was devoted to the modes of proving documents according to the best evidence rule. But in the assessment of damages in a case like this a simpler approach would also help.

First on the question of the number of years purchase where we dismissed the appeal against the decision of the learned Judge to revise the award of the learned President. The learned President dealt with the issue (page 113) as follows:

"The deceased was 33 years of age when he was killed in the motor accident. Barring unforseen circumstances he should have another 22 years before reaching the retiring age of 55 years. He had no plan for marriage. The plaintiff was 51 years old at the time of his death and the normal expectation of life for a woman is 68 years old. Hence in this case the plaintiff who is in good health has a normal life expectancy of 17 years from the date of deceased's death."

We feel that the award of the learned President was far too excessive reflecting a wholly erroneous estimate. The learned appellate Judge dealt with the same question (page 45) as follows:

"93. As for the number of years purchase it is observed that the learned President took 17 years life expectancy and reduced this figure by a third for contingencies bringing the figure down to 11 years and 3 months.

94. This figure would have been unobjectionable if everything else was equal. But this deceased was a bachelor of 33, and to all accounts quite eligible. I hold therefore that the prospect of his getting married was so much on the cards that the very maximum allowance that one could have made for the continuation of support was 7 years and that is the figure I choose."

We agree with the learned Judge. Much argument was directed against the words "prospect of his getting married was so much on the cards" used by the learned Judge in his written judgment. We feel that these words are merely a manner of expression and do not reflect any danger of speculation. We are certain that what the learned Judge had in his mind when he used these words were the age of the deceased and the normal prospect of marriage. He was not merely speculating.

There were in fact more elements of speculation in *Kandalla* v. *British Airways Board*[2] where the exact income of the deceased was unknown and the deceased were not supporting their parents at the time of their death and that in respect of one of the deceased daughters there was only talk (which in any case was disputed) of a pending engagement at the time of the accident.

The prospect of marriage is always a relevant factor when assessing the damages to be awarded to parents for the death of an unmarried child who was contributing to their keep for on marriage the child would be likely to reduce or even discontinue the contribution. Each case must of course depend on its particular facts but there is always one factor common to such cases. That factor is the possibility or even probability that if the deceased had not died he would some day marry and in consequence his contribution to his parents would become much smaller or even diminish. *Kemp & Kemp's* The Quantum of Damages, Vol. 1 pg. 237, referred to the two decisions of the Court of Appeal providing a useful guide as to the multiplier likely to be adopted in such cases. In *Brennan* v. *Richard Johnson and Nephew Ltd.*[3] the Court of Appeal increased the trial Judge's award. In *Dolbey* v. *Goodwin*[4] the Court of Appeal reduced the award. In both cases the deceased son was unmarried and in his twenties. In *Brennan's case* the Court of Appeal applied a multiplier of about 7½ and in *Dolbey's case,* 8½. The principal reason for applying a smaller multiplier in the case of a deceased son than in the case of a deceased spouse is of course because if the son had married there would be prior claims which would reduce or even diminish his contribution to his parents.

As regards the other items of the award where we restored the judgment of the learned President we feel that certain well established principles must be followed by courts exercising appellate powers. The amount awarded for damages for loss of dependency was strenuously contested. The learned President arrived at a figure of $100/- per mensem as value of dependency. The learned Judge thought that he could not accept $200/- per mensem as claimed nor could he agree to $100/- per mensem as decided by the lower court as it was he said a "little on the high side" and then varied the sum to $75/- per mensem. It has however long been settled that where a trial judge has erred in the "direction of being too generous" that would not by itself constitute a matter to be appealed from *(Pahang Lim Siong Motor Co. & Anor.* v. *Cheong Swee Khai & Anor.)*[5] In *United*

Plywood & Sawmill Ltd. v. *Lock Ngan Loi*[6] Gill F.J. (as he then was) explained the principle clearly when he said:

"The general principle is that an appellate court can only interfere with an assessment if it is considered so inordinately low or inordinately high as to make the court exclaim, 'Good gracious, is that the sum which has been awarded – that sum must be altered', or it is so much out of line with the discernible trend or pattern of awards in reasonably comparable cases that it must be regarded as a wholly erroneous estimate."

In such assessment there is generally ample room for individual choice to arrive at a fair and reasonable figure and the appellate court is always slow to reverse the trial Judge's decision on such assessment unless there are strong grounds for interference. The Federal Court in *Kek Kee Leng* v. *Teresa Bong Nguk Chin & Anor.*[7] following Lord Wright's judgment in *Davies* v. *Powell Duffryn Associated Collieries Ltd.* [8] at pages 616-617 again stressed that it is not enough that there is a balance of opinion or preference. "The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

The two items (funeral expenses and repair of motor-cycle) on which there was much argument and in respect of which we also restored the awards of the learned President are special damages. True, special damages must be proved – see Judgment of Lord Goddard in *Bonham-Carter* v. *Hyde Park Hotel Ltd.*[9] quoted in *Lee Sau Kong* v. *Leow Cheng Chiang.*[10] Being special damages they are therefore not really a case of "measuring the immeasurable" *(Rushton* v. *National Coal Board)*[11] but to what extent the court in the first instance was satisfied that the claims have been proved on the balance of probabilities. It is clear from the record here that as regards the cost of repair of the motor-cycle the appellant has said in her evidence-in-chief that the deceased's motor-cycle was sent for repairs after the accident and tendered a receipt for the payment of the repairs although she was not the one who made the payment. True, in cross-examination she also said that she had not taken the motor-cycle for repair herself. There is no dispute that the damage to the motor-cycle was as a result of the accident and that the photographs of the damage are shown in the photographs P4A, B and C. There is also sworn evidence that the motor-cycle had been sent for repairs and certain payments had been made towards the repairs. These claims had been pleaded and particularised in the statement of claim. We do not therefore think that the learned appellate Judge was correct in disallowing the award of $400/- made by the learned President for this item.

As regards funeral expenses the learned appellate Judge also disallowed the claim mainly on the grounds that the funeral expenses had not been strictly proved. Here we feel that the case is in fact stronger for not interfering with the award of the learned President. Even during argument before us counsel for the respondent conceded that some expenses had been incurred as funeral expenses. Counsel for the appellant referred to the exchange of letters at pages 170 and 171 of the appeal record. In a "Without Prejudice" letter dated July 23, 1980 from solicitors of the respondent to solicitors of the appellant an offer was made to agree to funeral expenses at $750/-. As in the case of the claim for repair of the motor-cycle referred to previously the appellant claimed in her evidence for funeral expenses incurred to the amount of $2,545.25 and produced 14 receipts which later were disputed by the respondent. The learned President awarded $2,000/- for funeral expenses which he considered fair and reasonable obviously based partly on the oral testimony and partly using his own knowledge of Chinese funerals. The learned appellate Judge referred to sections 56 and 57 of the Evidence Act 1950. He said that the Act had laid down what the court can take judicial notice of and everything else must be proved. We think that section 57 of the Evidence Act merely sets out matters which the court must take Judicial notice of and the list therein is not exhaustive and the court under section 56 of the Act may also take judicial notice of matters which are of common and general knowledge. In arriving at a reasonable and fair amount of compensation to be awarded, it was not wrong for the learned President to take judicial notice of Chinese funeral expenses and the fact that such expenses are normally incurred and only the amount would vary according to the status of the deceased or such other matters which may be considered by the court. One has to be guided by what is reasonable. Thus in *Hart* v. *Griffith-Jones*[12] Streatfield J. allowed the cost of embalming but disallowed the cost of a monument over the grave of the deceased. The status or station in life of a deceased and other relevant matters may be considered in arriving at a fair and reasonable figure as funeral expenses.

At the conclusion of arguments before us we dismissed the appeal against the award of the learned appellate Judge reducing the number of years purchase from 17 years to 7 years but restored the remaining awards of the learned President which had been set aside by the learned Judge.

Order accordingly.

Solicitors: *Tan & Tan; Varughese & Co.*

PERMODALAN PLANTATIONS SDN. BHD. v. RACHUTA SDN. BHD.

[F.C. (Salleh Abas L.P., Wan Suleiman & Seah F.JJ.) July 10 & October 6, 1984]
[Kuala Lumpur – Federal Court Civil Appeal No. 344 of 1983]

Practice and procedure – Set-off – Counterclaim Difference between set off and counterclaim – Where set off arises from separate transaction, it amounts to a counterclaim – Summary judgment – R.H.C. 1980, O.14 r.3, O.18 r.17, O.15 r.2 & O.27 r.3 – Courts of Judicature Act (Act 91), s. 25(2) and Schedule – Civil Law Act, 1956, s. 6.

English Law – Legal set-off and equitable set-off – Courts of Judicature Act (Act 91), s. 25(2) and Schedule – Civil Law Act, 1956, s. 6.

In this case the appellants had entered into an agreement with the respondents to buy mawa seeds from the respondents. Susbequently disputes arose between them and as a result the appellants commenced two civil suits against the respondents. In the first suit the appellants alleged a breach of the sale agreement by the respondents by supplying them with non-mawa seeds. Unconditional leave to defend in this case was granted and the suit was pending. In the second suit the appellants claimed a refund of a total sum of $350,000/- which they on various occasions gave to the respondents to provide a bank guarantee to the Customs in connection with the shipment of mawa seeds to the appellants. The respondents admitted receiving the sum but denied liability to refund the full amount. They claimed a lien on the sum because the appellants had not paid them three sums which they alleged to have been due to them. Therefore they pleaded a defence of set-off and added a counterclaim thereto. The three sums which they alleged to be due to them were –

(1) $223,756/- being the balance of the price of mawa seeds supplied to the appellants which they had not paid:

(2) $40,000/- being the price of 2,000 bags of rock phosphate supplied to the appellants; and

(3) $6,543.30 being the handling and other charges incurred by the respondents in shipping the seeds to the appellants.

In reply the appellants contended that no such defence of set-off could be allowed in the suit because the respondent had already admitted receiving the sum of $350,000/- as claimed and if they wished to set up a defence of set-off they should do so in the first suit because the sums sought to be set-off by the respondents all relate to the performance of the sale agreement in respect of which the first suit was instituted.

The Senior Assistant Registrar who heard the appellant's application for final judgment decided that the appellants were not entitled to the full sum but only to a sum of $76,700.70 and that the balance of their claim was to be withheld until the respondent's set-off and counterclaim was tried. An appeal to the High Court was dismissed and the appellants appealed.

Held: (1) even it is accepted that the respondents' defence is nothing but a counterclaim it is still open to the court to make the decision which the Senior Assistant Registrar did, because the judgment was a summary judgment issued in accordance with Order 14 rule 3 of the Rules of the High Court; (2) if a cross-claim by the defendant as set-off does not and cannot absolve the plaintiff's claim because it arises from a separate transaction the cross-claim is not necessarily a set-off and such a cross-claim can only amount to a counterclaim; (3) in this case the advances by the appellants and the receipt by the respondents of the sum claimed are part of the Sales Agreement. The signing of the Guarantee Agreement which refers to this sum does not render it to be a separate agreement nor an independent transaction, it being supplemental to the former.

Semble: There being no Malaysian statutes comparable to the United Kingdom statutes on the subject of set-off, only equitable and not legal set-off is part of our law and the court can only deal with an equitable set-off.

Cases referred to:

(1) *Hanak* v. *Green* [1958] 2 Q.B. 9, 26.
(2) *In re a Bankruptcy Notice* [1934] Ch. 431, 437.
(3) *Rawson* v. *Samuel* (1841) Cr. & Ph. 161, 178; 41 E.R. 451.
(4). *Damodaran* v. *Vesudevan* [1975] 2 M.L.J. 231, 232.
(5). *T. Damodaran* v. *Choe Kuan Him* [1979] 2 M.L.J. 267, 270.
(6). *Pahang South Union Omnibus Co. Bhd.* v. *Minister of Labour and Manpower* [1981] 2 M.L.J. 199 204.
(7). *Federal Commerce & Navigation Co. Ltd* v. *Molena Alpha Inc.* [1978] 3 W.L.R. 309, 337 – 338.

FEDERAL COURT.

C. Abraham for the appellants.
V. K. Palasuntharam for the respondents.

Cur. Adv. Vult.

Salleh Abas L.P. (delivering the Judgment of the Court): This is an appeal from the decision of Zakaria Yatim J. confirming the decision of a